

83 - 1100

No.

In the Supreme Court
OF THE
United States

GARY LEE BATTAGLIA,
Petitioner,

VS.

THE COMMITTEE OF BAR EXAMINERS OF THE
STATE BAR OF CALIFORNIA,
Respondent.

SUPPLEMENTAL APPENDIX TO
WRIT OF CERTIORARI

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Supreme Court, U.S.
FILED

JAN 16 1984

ALEXANDER L. STEVENS
CLERK

BEFORE THE STATE BAR COURT
OF THE STATE OF CALIFORNIA
DISTRICT 4

In the Matter of the)	
Application of)	No. 81-M-22-SF
)	
GARY LEE BATTAGLIA)	FINDINGS OF FACT
)	AND
To Be Admitted to the)	RECOMMENDATION
Practice of Law)	
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The above matter having been set for hearing, pursuant to the Rule Regulating Admission to Practice Law in California, including a statement of the matters to be subject of the hearing (but not necessarily limited to those matters), and written notice of the hearing dated December 26, 1981 having been given, the above-entitled matter came on regularly for the first hearing on Friday, March 12, 1982 at 9:30 a.m. at the offices of the State Bar of California, 555 Franklin Street, San Francisco, California 94102.

Present at that first hearing and all subsequent hearings were Patricia A. Carson, Esq., Principal Referee; Carlo S. Fowler, Esq., Referee; and Margaret C. Gill, Esq., Referee. Also present at all of the hearings were the applicant, Gary Lee Battaglia; Alvin H. Goldstein, Jr., Esq., attorney for the applicant; and Robert G. Hulteng, Esq., Examiner for the State Bar Court.

The hearings were reported by Dave Davenport, C.S.R., with the firm of Wm. E. Henderschied, 41 Sutter Street, San Francisco, California.

In addition to the first hearing on March 12, 1982, the following hearings were held in this matter:

Monday, March 22, 1982

Friday, March 26, 1982

Monday, April 19, 1982

Tuesday, April 20, 1982

Wednesday, May 12, 1982

Thursday, May 20, 1982

Tuesday, June 1, 1982

Thursday, July 1, 1982

Friday, July 9, 1982

During the hearings oral testimony of the Applicant and numerous witnesses was taken. Documentary evidence was presented by the Applicant in the form of 51 exhibits. The State Bar presented 44 exhibits. Both sides prepared written briefs after closing arguments.

The Hearing Panel makes the following findings of fact:

FINDINGS OF FACT

1. The Applicant, GARY LEE BATTAGLIA, was born January 31, 1951 and has lived in and around Santa Rosa, California all of his life. He attended Santa Rosa Junior College over a three-year period and completed 70 units there. He received no degree. He attended Sonoma State College

for one semester and one summer. He began Lincoln University Law School January 1972. He graduated from that law school and passed the professional responsibility examination in May 1977. Applicant first took the bar examination in July 1977. In December 1977 he was notified that he had passed the multi-state portion, but failed the essay part. The second time he took the bar examination was February 1978. In May 1978 he was notified that he had failed the essay portion again. He took the bar examination a third time in July 1978. In December 1978 he was notified that he had passed the examination.

In 1979 there were extensive hearings as the result of a Notice of Hearing dated April 5, 1979, in which the specification was stated as follows:

"Your possible involvement in prostitution, pimping, and/or pandering activities."

In June 1979 a Hearing Panel of the State Bar Court held a hearing on the foregoing specifications and found that the "Applicant is not now an honest, fair person of candor and trustworthiness who will observe the fiduciary responsibility of an attorney under the laws of the State of California, and the United States or who has respect for the rights of others or for the judicial process" and the panel recommended that the Applicant not be admitted to practice.

On December 8, 1979 the full Committee of the Bar Examiners of the State Bar of California heard the Application of Gary Lee Battaglia, and recommended that his admission to practice be denied with the usual time for re-application shortened from two years to one year. Thus Applicant was authorized to re-apply in December 1980, presumably for good cause shown. [Rule X §104(a).]

In January 1981 Applicant filed a re-application. The Notice of Hearing and specification in the present hearings before this Hearing Panel resulted from that 1981 re-application. (See Applicant's Exhibit 49.)

The Notice of Hearing in the instant matter dated December 28, 1981 set forth the concern generally for the Applicant's moral character, to include, but not necessarily be limited to, the following:

Facts and circumstances surrounding your 1980 bankruptcy, specifically the finding of the United States Bankruptcy Court for the Northern District of California, dated September 17, 1981, that certain credit card charges were non-dischargeable because you had no reasonable belief that you could pay for the purchase (in

the amount of \$9,083.24) at any
time they were incurred.

[Emphasis added.]

2. In late 1977 the Applicant received an unsolicited application from Citibank in New York for a Visa card with a credit limit of \$1,100.00. This was a promotional campaign by Citibank and was mailed out as a pre-approved credit card to certain selected groups without any specific credit check on the recipient of the invitation. The Visa card was applied for by Mr. Battaglia on December 2, 1977 and the card was received in January 1978. (State Bar Exhibit #6.) The Applicant had just received his notice that he had not passed the essay part of the bar examination and was preparing to take, and did take, the February 1978 Bar examination.

3. Applicant began to use the Visa card in January 1978 and during the first month of use he charged \$1,544.80,

exceeding his credit limit by \$444.80. The mailing address on the Citibank statements for January and February 1978 is Gary L. Battaglia, 999 Sonoma Avenue, Apt. 15, Santa Rosa, California 95404. The statements for March, April and May 1978 are missing. (State Bar Exhibit #6.) The statements from Citibank beginning June 1978 and continuing through October 1978 (when the Applicant ceased making any charges on the Visa card) were addressed to Gary L. Battaglia, c/o PY 332049 CA 95404, 2401 North Mayfair Road, Milwaukee, WI 53226. (Milwaukee headquarters for Payco.) Later in 1979 there are some statements addressed to Gary L. Battaglia, c/o Steven Goodman, 575 Lexington Avenue, 15th Floor, New York, NY 10022. (See Applicant's Exhibits 1-A through 1-K.) Applicant only received the first statement from Citibank, and after he stopped using the Visa card in October 1978, he

returned the card the day it was demanded that he do so.

4. During the time the Applicant used the Visa card it appears from the numerous and various charges that he was "living off" the card. For example, on May 2, 1978 he charged lunch at the Captain's Table in Santa Rosa for \$17.12 and left a \$5.00 tip. (State Bar Exhibit #26.) On May 13, 1978, he charged "food" at the Tides in Bodega Bay in the amount of \$9.75 and left a \$5.00 tip. (State Bar Exhibit #27.) On May 30, 1975 he charged (presumably food) at Fiori Grace and Company in Santa Rosa in the amount of \$7.25 and left a \$5.00 tip (State Bar Exhibit #29) and on September 4, 1978 he charged again at Fiori Grace and Company food in the amount of \$3.75 and left a tip in the amount of \$5.00. (State Bar Exhibit #30.)

5. Applicant has worked as a clerk in retail stores where charge cards are used routinely. Except for the first month of use in January 1978 the Applicant never charged more than \$50.00 on any single sales slip. (State Bar Exhibit #6.) The \$50.00 is the merchant's floor limit, and anything over \$50.00 needs telephone authorization.

6. Citibank assigned Applicant's Visa account to Payco General American Credits, Inc., a corporation, for collection.

7. Applicant made a total of three payments to Citibank on his account. Two payments of \$10.00 each were made to Payco in June and July 1978. (See handwritten letter dated 7/15/78 - Battaglia to Payco. State Bar Exhibit #6.) A third payment of \$35.00 was made prior to assignment of the claim to Payco.

8. Through its Mikwaukee, Wisconsin office, Payco sent demands for payment to Mr. Battaglia on May 10, 1978, May 23, 1978, June 9, 1978 and July 6, 1978. On July 11, 1978 the matter was referred to California counsel.

9. In a Complaint for Money dated November 27, 1978 entitled Payco of California, Inc., a California corporation, v. Gary L. Battaglia, being No. 100-613, Superior Court of California, County of Sonoma, Payco asked for \$14,637.27 plus \$3,659.31 for attorneys' fees if the matter proceeded on an uncontested basis, plus costs. (Applicant's Exhibit #3.)

10. Payco's amended Complaint for Money (as of Course C.C.P. §472) dated January 31, 1979 prayed for \$19,327.47 principal, plus \$3,659.31 attorneys' fees if the matter proceeded on an uncontested basis, plus costs. (Applicant's Exhibit #4.)

11. On March 12, 1980, on advice of his counsel at that time, Irv Piotrkowski, Esq., Gary L. Battaglia filed a Voluntary Case: Debtor's Petition in the United States Bankruptcy Court, for the Northern District of California, Case No. 1-80-00192, in which he listed among other items, the Payco debt in the amount referred to in paragraph 10 above. (State Bar Exhibit #1.)

12. On June 19, 1980, Payco filed in the United States Bankruptcy Court, Northern District, in Case No. 1-80-00192, a Complaint to Determine Nondischargeability of Debt seeking judgment for \$19,329.49, plus interest at 7% from November 9, 1978, plus attorneys' fees in the sum of \$3,659.31, if contested, and costs of suit. (State Bar Exhibit #2.)

13. On August 18, 1981, at the trial on the adversary proceeding to determine Nondischargeability of Debt, the Applicant

and his counsel, together with attorneys for Payco, stipulated that \$9,083.24 was due Citibank on Applicant's Visa account for the months of January, February, June, July, August, September and October 1978. The Applicant and his counsel did not demand and were not offered any signed charge slips or documentation for this amount. The court found that "Defendant Battaglia had no reasonable belief that he could pay for the credit card purchases at a specific time." [Emphasis added.] (State Bar Exhibit #3.)

14. On August 24, 1981, the Applicant filed in the United States Bankruptcy Court for the Northern District of California an original Petition Under Chapter Thirteen. (State Bar Exhibit #5.)

15. Payco has actual signed charge tags totalling about \$3,856.48, and has provided a schedule of charges 1-A through 1-K which total about \$8,882.15.

Applicant does not deny these charges and virtually all listed charges are at places Applicant frequented. The problems that arose with Citibank's procedure and records keeping were numerous. The Visa-card was a fairly new merchandising effort on their part. The charge transactions were sent through various means to the Citibank center in New York where there were storage problems, computer error, and finally the originals were destroyed after being microfilmed.

16. On September 17, 1981, in the matter of Payco v. Battaglia in the United States Bankruptcy Court, Northern District of California, No. 1-80-00192, the Court made its order in favor of Payco holding that the principal sum of \$9,083.24 is decreed to be nondischargeable pursuant to the provision of 11 U.S.C. 523(a) (2) (A). That section refers to "false pretenses, a

false representation, or actual fraud."
(State Bar Exhibit #4.)

17. On June 17, 1982 in the United States Bankruptcy proceedings No. 1-80-00192 an Order Setting Aside Judgemtn of Nondischargeability and Dismissing Chapter 7 Proceedings was filed in the Payco v. Battaglia litigation. (Applicant's Exhibit #51.) (The Applicant has stipulated with Payco that he will pay Payco the amount of the signed Visa card charges, i.e., \$3,856.48.)

18. Applicant has been married and was divorced in late 1975, but has always made regular support payments for his daughter.

19. During the period from late 1976 through 1978 Applicant had personal problems, did not work regularly and had relatively low income, but during that period he did make payments on debts incurred for

himself and others, including some significant debts of a nonessential nature.

20. The Applicant used monumental bad judgment in his choice of associates, the management of his financial affairs and his placement of priorities in his life generally during the period mid-1976 through 1978. He also appears to have received some inadequate legal representation along the way from friends and associates.

21. This Hearing Panel must accept as res judicata the findings of the prior Hearing Panel and Full Committee of State Bar Examiners in 1979, and has considered them.

22. This panel does not condone the conduct of Mr. Battaglia during the period mid-1976 through 1978. The panel has concluded, with considerable difficulty, that Applicant is rehabilitated. The panel believes that Applicant presently

possesses good moral character sufficient to entitle him to practice law as defined in Rule X, Section 102, of the Rule Regulating Admission to Practice Law in California. However, the panel notes with concern that in various financial matters referred to during the proceedings Applicant's financial judgment continues to be poor.

CONCLUSIONS AND RECOMMENDATIONS

The Applicant should be certified to practice law in the State of California forthwith.

Dated: November 17, 1982.

Patricia A. Carson, Esq.
Principal Referee

Carlo S. Fowler, Esq.
Referee

Margaret G. Gill, Esq.
Referee

THE COMMITTEE OF BAR EXAMINERS
OF THE
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The Committee of Bar Examiners ("Committee") of the State Bar of California, while in formal session on Friday, February 11, 1983, received and considered the testimony of the applicant, Gary Lee Battaglia, and the oral arguments of his counsel and the Examiner for the State Bar.

Pursuant to applicant's motion, the Committee reopened the hearing on Friday, April 30, 1983, for the exclusive purpose of considering those portions of the record which were not before the Committee

at the time of the February 11, 1983 hearing.

FINDINGS OF FACT

1. On November 22, 1982, a hearing panel of the State Bar Court of the State Bar of California filed its report and recommendation in reference to applicant Gary Lee Battaglia, concluding "with considerable difficulty that the applicant is rehabilitated" and recommending that the applicant be certified to practice law in the State of California.

2. The Division of Trial Counsel of the State Bar of California filed a timely application to have the matter set for hearing before the Committee pursuant to the provisions of Rule X, Section 103(b).

3. Pursuant to the provisions of Rule X, Section 104(b), the Committee ordered a hearing before it. Notice

having been given, said hearing convened on February 11, 1983.

4. On February 15, 1983, the Committee, through its Executive Director, informed applicant's counsel that the Committee had determined that applicant did not qualify for admission to practice law under Article IV, Section 6060 of the Business and Professions Code and Rule X of the Rules Regulating Admission to Practice Law in California and that, therefore, the applicant would not be certified for admission to the Bar of the State of California.

5. On February 16, 1983, applicant filed a motion asking the Committee to vacate its decision of February 11, 1983 and to reopen the hearing. The motion was based on failure to comply with the requirements of Rule X, Section 103(f) in that a full transcript of the hearing before the hearing panel of the State Bar

Court had not been available at the time of the February 11, 1983 hearing.

6. On March 26, 1983, the Committee granted applicant's motion to reopen the hearing for the limited purpose of considering those portions of the record which had not been available at the February 11, 1983 hearing. Notice having been given, the Committee convened for further hearing on April 30, 1983.

7. Upon consideration of the record and the testimony given by the applicant, the Committee adopts and incorporates herein by reference findings 1 through 21, inclusive, contained in the Findings of Fact and Recommendation of the hearing panel issued on November 17, 1982 and filed on November 22, 1982.

8. During the period of time between January 1978 and October 1978, when he was "living off" the Visa credit card, applicant Gary Lee Battaglia had no reasonable

belief that he could pay for the credit card purchases at a specific time.

9. The applicant's judgment in various financial matters referred to during the proceedings before the hearing panel and before the Committee continues to be poor.

10. The applicant was less than candid when testifying before the Committee on February 11, 1983.

11. The applicant has failed to demonstrate that he is rehabilitated and presently possesses the good moral character required by Business and Professions Code Sections 6060 and 6062 and Rule X of the Rules Regulating Admission to Practice Law in California.

CONCLUSION

Gary Lee Battaglia shall not be certified to the Supreme Court of the State

of California for admission to practice
law in the State of California.

Dated: May 20, 1983.

Martin R. Glick
Chair, The Committee
of Bar Examiners